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IN THE

Supreme Court of the United States

October Term, 1951.

No. 402.

HONORABLE PAUL LEAHY, Chief Judge of the United States District Court for the District of Delaware and NATIONAL CAN CORPORATION,

Petitioners,

against

THE CANISTER COMPANY and THE CANISTER COMPANY, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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October 26, 1951.

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HONORABLE PAUL LEAHY, CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE AND NATIONAL CAN CORPORATION,

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against

THE CANISTER COMPANY AND THE CANISTER COMPANY, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners, the Honorable Paul Leahy and National Can Corporation (hereinafter called "National Can"), respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Third Circuit on a petition for a writ of mandamus, filed August 30, 1951, on the basis of which that Court issued, on September 10, 1951, a peremptory writ against the Honorable Paul Leahy, United States District Court Judge of the District of Delaware.

Judge Leahy joins in this petition from a desire to see important and oft litigated questions finally settled.

However, he took no part in the preparation of this Petition and expresses no views as to its contents. The grounds on which he based the order which the Court of Appeals for the Third Circuit ordered him to reverse are set forth at length in his opinion (R. 43-52).

OPINIONS BELOW.

Neither the opinion of Judge Leahy (R. 43-52) nor the principal opinion of the Court of Appeals (R. 135-38) has as yet been officially reported. An earlier and related opinion of the Court of Appeals is reported as *Canister Company, et al. v. Leahy*, 182 F. 2d 510 (1950).

JURISDICTION.

The judgment of the Court of Appeals was entered on August 30, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

If this Court grants this Petition, National Can will urge that the decision below is wrong for the following reasons:

1. The Court of Appeals abused its discretion by reviewing the interlocutory order of Judge Leahy by writ of mandamus prior to a final judgment.

2. Rule 38(b) of the Federal Rules of Civil Procedure does not give a plaintiff the right to a jury trial on the issue of damages upon the amendment of his complaint in the circumstances presented by this case, to wit:

(a) The original complaints filed by the plaintiffs in the District Court in 1943 sought specific performance of a contract and $10,000,000 damages for its breach;

(b) In January of 1944, the issue of specific performance became moot;

(c) In February of 1947, all issues save the issue of damages were adjudicated in favor of the plaintiffs after a trial by the court without a jury;

(d) Both the trial court and counsel for the plaintiffs treated the action as a legal action at all times; and

(e) The plaintiffs filed an amended complaint in October of 1950 which differed from the original complaint only by omitting the prayer for equitable relief.

3. A party's right to a jury trial, in a diversity action, is governed by state law under the doctrine of *Erie Railroad Co. v. Tompkins.*

SUMMARY OF REASONS FOR GRANTING THE WRIT.

1. The review by the Court of Appeals of the order of the District Court on petition for writ of mandamus conflicts in principle with prior decisions of this Court.

2. The Court of Appeals' view, that the plaintiffs-respondents' right to trial by jury arose only upon amendment of their pleadings so as to eliminate their demand for equitable relief, conflicts with prior decisions of the Court of Appeals for the Fifth and Ninth Circuits and with the letter and spirit of the Federal Rules of Civil Procedure.

3. This Court should determine at this time whether, in a diversity case, a party's right to jury trial is governed by state law.

STATEMENT.

I.

Prior Proceedings in This Litigation.

The case now presented to this Court involves one aspect—plaintiffs-respondents' right to jury trial of the issue of damages—of a very complicated litigation now pending in the District Court for the District of Delaware.[1] The jurisdiction of the federal courts over this litigation is based upon diversity of citizenship (R. 8). This litigation has been actively contested in the District Court since its commencement. There have been more than 200 separate papers filed and there have been 22 separate hearings, including a trial of preliminary issues which lasted for seven days (R. 54-67). Petitioner Judge Leahy presided at that trial and at all other hearings in the District Court.

The original complaint in the District Court was filed in May, 1943. It alleged the breach of an oral contract whereby National Can agreed to manufacture for and deliver to Canister certain sets of metal parts to be used by Canister in the manufacture of fiber-bodied-metal-end paint cans. It prayed for specific performance of the alleged oral contract and damages in the amount of $10,000,000 (R. 8-13). In its answer, National Can denied the making of the contract and pleaded, as an affirmative defense, the New York statute of frauds (R. 84-90). Neither party asked for a jury trial.

Subsequently, National Can moved for a separate trial of the issue of liability, *i.e.* of the questions of whether there was a contract and of the applicability of the statute of

1. There were two actions pending in the District Court at the time the Court of Appeals issued its mandate. In one, The Canister Company was plaintiff; in the other, The Canister Company, Inc. was plaintiff. In both National Can was defendant. Since that mandate, the two actions have been consolidated for purposes of trial by order of the District Court. Hereinafter the plaintiffs-respondents will be considered as one and will be referred to as "Canister".

frauds. In November of 1943, Judge Leahy granted that motion, commenting as follows:

> ". . . the interest of the parties will best be served by ascertaining if we have a contract upon which an action may be maintained before we direct our attention to the large issues of breach and damages . . . ." *Canister Co. v. National Can Corp.*, 3 F. R. D. 279, 280.

In the fall of 1944, there was a full trial of the issue of liability. On November 17, 1945, Judge Leahy determined that issue in favor of Canister and stated that the "question of damages will be determined in further proceedings." *Canister Co. v. National Can Corp.*, 63 F. Supp. 361, 369. At the same time, he made findings of fact and conclusions of law. In February, 1946, he entered an order amending his original findings of fact to provide that the contract sued on had terminated on January 3, 1944 (R. 46). The correctness of this finding is not in issue in these proceedings and both the District Court (R. 52) and the Court of Appeals (*Canister Company, et al. v. Leahy*, 182 F. 2d 510, 512) have recognized that, if the contract terminated on January 3, 1944, the issue of specific performance became moot on that date.

In March, 1947, Judge Leahy entered judgment against National Can on the separate issue tried (R. 112-114). The order for judgment found that a valid and binding contract had been made by the parties and that it had been repudiated by National Can. Thus, the Court "adjudicated all issues save one, the issue of damages, in favor of Canister", (R. 136) and retained jurisdiction of the action solely "for the purpose of determining in future proceedings before this Court the question of damages in accordance with the findings and conclusions, as amended, and this decree." (R. 114).

Thereafter, Canister appealed to the Court of Appeals from that portion of the judgment which related to the

terminal date of the contract. Its appeal was dismissed as premature in September, 1947. *Canister Company v. National Can Corp.*, 163 F. 2d 683.

II.

Canister's Efforts to Secure a Jury Trial.

During the course of the proceedings set forth above, Canister made no effort to obtain a jury trial in respect to any issue. In June of 1948, it made its first attempt to obtain a jury trial of the remaining issue of damages. It filed a motion, pursuant to Rule 39(b) of the Federal Rules of Civil Procedure, asking that the court exercise its discretion by granting a jury trial. Judge Leahy denied the motion. *Canister Co. v. National Can Corp.*, 8 F .R. D. 408 (1948).

> "From the beginning I regarded this case as an action of law and it was so treated by all counsel. To take action under Rule 39(b) and grant a jury trial would, of course, be by an exercise of discretion. But an exercise of discretion contemplated by the rule must be based on circumstances warranting its exercise lest discretion become the mere arbitrary act of the Court Plaintiffs' failure to ask for a jury trial for over five years cannot be excused or afford a basis for an exercise of discretion. Plaintiffs are too late." *Id.* at 409.

Thereafter, in January of 1949, Canister filed a paper entitled "Waiver of Equitable Relief and Demand for Jury" (R. 23) and moved for a jury trial as of right under Rule 38(b) of the Federal Rules of Civil Procedure. This motion was based on the ground that the prayer for specific performance had become moot leaving only actions at law properly triable by a jury. Judge Leahy denied Canister's motion (R. 24-26) and Canister petitioned the Court of Appeals for a writ of mandamus to require Judge Leahy to place the case on the jury list for trial. The Court of Appeals denied Canister's petition on the ground that since

the complaint still sought relief in equity it stated no issues triable of right by a jury within the meaning of Rule 38(b). *Canister Co., et al. v. Leahy,* 182 F. 2d 510 (1950). It expressed the opinion that "the form of a complaint and the nature of the relief prayed for in it must guide a trial court in its determination as to whether or not a trial shall be to the court or by a jury." *Id.* at 513.

Canister then moved in the District Court to amend its complaint. Judge Leahy granted this motion (R. 27) and the amended complaint and a demand for jury trial were served and filed on October 3, 1950. The amended complaint was identical to the original complaint in every respect except for the prayer for relief which asked only for damages and omitted any reference to specific performance (R. 28-33). Thereafter, on motion of National Can, Judge Leahy entered an order striking the demand for jury trial. In his opinion Judge Leahy stated:

> "The entire history of the litigation in this court demonstrates plaintiffs prosecuted and considered the action as a legal action at all times. They never showed any interest in equitable relief. . . . *The basic reality is plaintiffs have prosecuted this case as a legal action for damages and not as an action for equitable relief.* . . ." (R. 44-45)

Again, at a later point in his opinion, Judge Leahy re-emphasized this "basic reality":

> "The record of the litigation in this court, on file in the office of the Clerk, discloses that in these actions plaintiffs were interested solely in legal relief. The issues raised and litigated in the long history of this litigation have been legal issues. The request for damages for $10,000,000 was never considered by the parties as 'incidental' to the prayer for equitable relief. Plaintiffs have never, formally or informally, moved for specific performance of the contract, or for any form of equitable relief, and so, therefore, I, as well

as all other counsel for plaintiffs,[2] have always characterized this case as a law suit." (R. 49)

On March 12, 1951, Canister once again petitioned for a writ of mandamus and a writ was issued on September 10, 1951. The opinion of the Court of Appeals, filed in connection with the issuance of that writ, expresses the opinion that Canister had "brought itself within the provisions of Rule 38(b)" by serving and filing its amended complaint and its demand for jury trial on October 3, 1950 and that the "demand for jury trial was made within '10 days of the service of the last pleading directed to such issue.'" (R. 138).

Thus, on August 30, 1951, more than 7 years after the issue of specific performance had become moot and more than 4 years after all issues save the issue of damages had been adjudicated in favor of plaintiff, it was held that plaintiff was entitled to a jury trial.

REASONS FOR GRANTING THE WRIT.

I.

The Review of the Order of the District Court on Petition for Writ of Mandamus Conflicts in Principle With Prior Decisions of This Court and Circumvents the Final Judgment Rule as Laid Down by Decisions of This Court.

Before the reasons for granting certiorari related to the merits of the Court of Appeals' decision are considered, a preliminary question of abuse of discretion will be discussed.

The Court of Appeals reviewed Judge Leahy's interlocutory order striking Canister's demand for a jury trial through the device of a writ of mandamus issued pursuant to 28 U. S. C. § 1651(a), which reads as follows:

2. The numerous changes in Canister's counsel are noted in Judge Leahy's opinion. R. 43-52.

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their representative jurisdictions and agreeable to the usages and principles of law."

National Can concedes that the statutory language ted above gave the Court of Appeals the *power* to issue a writ. It contends, however, that the exercise of that er in the instant case was such an *abuse of discretion* o require exercise of this Court's supervisory jurisdic- over inferior federal courts.

The effect of Judge Leahy's order was to decide how facts in respect to damage in the instant litigation uld be determined, *i.e.*, by judge or by jury? Thus, ge Leahy did nothing more than determine how dis- ed factual issues in an action, in respect to which the trict Court clearly had jurisdiction both over the sub- matter and the parties, should be resolved. In so do- he was acting within his jurisdiction and not in excess it. "This is . . . a case of a judge making a ruling to the manner in which he will try one issue in a civil ion pending before himself." *City of Morgantown v. yal Insurance Company, Ltd.*, 337 U. S. 254, 257 (1949).[3]

THE PRINCIPLES ESTABLISHED BY THIS COURT AS GUIDES TO THE EXERCISE OF JUDICIAL DISCRETION WERE NOT FOLLOWED BY THE COURT BELOW.

In *Roche, et al. v. Evaported Milk Association, et al.*, U. S. 21 (1943), this Court considered the "principles ich should guide judicial discretion in the use of an ex- ordinary remedy" such as mandamus. *Id.* at 26.

In that case the question for decision was whether the urt of Appeals for the Ninth Circuit had "rightly issued writ of mandamus to the district court to correct that

3. The *City of Morgantown* case involved the question of the right of ap- from an order denying a jury trial. It will be considered at greater th hereinafter. See pp. 12-13 and 14-15 *infra*.

court's alleged error in striking respondent's pleas in abatement to a criminal indictment." *Id.* at 22. This Court held that, although the Court of Appeals had the power to issue the writ, its issuance in the circumstances revealed by the record therein constituted an abuse of discretion.

In reaching this result, Chief Justice Stone considered the principles which should guide judicial discretion in the use of extraordinary common law writs, such as mandamus, and stated those principles in these terms:

> "The common law writs, like equitable remedies, may be granted or withheld, in the sound discretion of the court. *Ex parte Peru, supra,* p. 584, and cases cited; *Whitney v. Dick,* 202 U. S. 132, 136, 140. Hence the question presented on this record is not whether the court below had power to grant the writ but whether in the light of all the circumstances the case was an appropriate one for the exercise of that power. In determining what is appropriate we look to those principles which should guide judicial discretion in the use of an extraordinary remedy rather than to formal rules rigorously controlling judicial action. Considerations of importance to our answer here are that the trial court, in striking the pleas in abatement, acted within its jurisdiction as a district court; that no action or omission on its part has thwarted or tends to thwart appellate review of the ruling; and that while a function of mandamus in aid of appellate jurisdiction is to remove obstacles to appeal, it may not appropriately be used merely as a substitute for the appeal procedure prescribed by the statute.
>
> "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. *Ex parte Peru, supra,* p. 584, and cases cited; *Ex parte*

Newman, 14 Wall. 152, 165-6, 169; *Ex parte Sawyer*, 21 Wall. 235, 238; *Interstate Commerce Comm'n v. United States ex rel. Campbell*, 289 U. S. 385, 394. Even in such cases appellate courts are reluctant to interfere with the decision of a lower court on jurisdictional questions which it was competent to decide and which are reviewable in the regular course of appeal. *Ex parte Harding*, 219 U. S. 363, 369; cf. *Stoll v. Gottlieb*, 305 U. S. 165; *Treinies v. Sunshine Mining Co.*, 308 U. S. 66.

"But the present case involves no question of the jurisdiction of the district court. Its jurisdiction of the persons of the defendants, and of the subject matter charged by the indictment, is not questioned. . . ." *Id.* at 25-26.

It is submitted that the criteria of the *Roche* case, if applied to the facts herein, demonstrate that the Court of Appeals below abused its discretion by issuing a writ of mandamus to review Judge Leahy's interlocutory order. Here, as well as there, the trial court "acted within its jurisdiction as a district court"; here, as well as there, "no act or omission on its part has thwarted or tends to thwart appellate review of the ruling"; and here, as well as there, mandamus is being "used merely as a substitute for the appeal procedure prescribed by the statute." *Id.* at 26. In both cases, the district court had unquestioned "jurisdiction of the persons of the defendants, and of the subject matter charged by the indictment". *Ibid.* Thus, in neither case could it be said that the writ was being used "to confine an inferior court to a lawful exercise of its prescribed jurisdiction". *Ibid.* Hence, in both cases, in "issuing the writ the court of appeals below has done no more than substitute mandamus for an appeal contrary to the statutes and the policy of Congress, which has restricted that court's appellate review to final judgments of the district court." *Id.* at 32.

B. The Court of Appeals Justified Its Exercise of Discretion on Grounds Which Have Been Rejected by This Court.

The Court of Appeals below apparently justified its exercise of discretion by this argument: "Appeal, after an abortive trial to the court, would be a clearly inadequate remedy." (R. 138). This argument is completely refuted by *City of Morgantown v. Royal Insurance Co., Ltd.*, 337 U. S. 254 (1949). In that case the Insurance Company brought an action seeking to reform a fire insurance policy on the ground of mutual mistake. The City answered, counterclaimed for the loss covered by the policy and demanded a jury trial. Thereafter, the Insurance Company moved to strike the demand for jury trial. That motion was granted and the case was set for trial to the court without a jury. The City then appealed the court's interlocutory order. The Court of Appeals dismissed the appeal on the ground that it was from an interlocutory order and the Supreme Court took the case on a writ of certiorari. After considering the appealability of the order in question, this Court affirmed the Court of Appeals.

In resolving the issue before it, the Supreme Court indicated that appeal from final judgment was an adequate remedy to correct an erroneous denial of a right to jury trial.

> "Trial by jury is a vital and cherished right, integral in our judicial system. It is argued that the importance of an interlocutory order denying or granting jury trial is such that it should be appealable. Many interlocutory orders are equally important, and may determine the outcome of the litigation, but they are not for that reason converted into injunctions. The Constitution guarantees to litigants in the federal courts the right to have their cases tried by juries, and Rule 38 of the Rules of Civil Procedure explicitly implements that guarantee. Denial of the right in a case where the demanding party is entitled to it is of course

error. The rulings of the district courts granting or denying jury trials are subject to the most exacting scrutiny on appeal." *Id.* at 258.

The conclusion that appeal from final judgment is an adequate remedy to correct an erroneous denial of jury trial cannot be upset by the argument that such a conclusion imposes inconvenience and expense upon Canister. In the *Roche* case, which has been discussed earlier (see pp. 9-11, *supra*), this Court explicitly rejected the contention that inconvenience and expense furnish grounds for the exercise of judicial discretion. In that case the respondents urged that a writ of mandamus was properly issued because of the inconvenience and expense to them of being forced to undergo a possibly abortive trial. The Supreme Court, in rejecting that argument stated:

> ". . . Respondents stress the inconvenience of requiring them to undergo a trial in advance of an appellate determination of the challenge now made to the validity of the indictment. We may assume, as they allege, that that trial may be of several months' duration and may be correspondingly costly and inconvenient. But that inconvenience is one which we must take it Congress contemplated in providing that only final judgments should be reviewable. Where the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals in criminal cases. *Cobbledick v. United States,* 309 U. S. 323. . . ." 319 U. S. 21, 30.

C. The Simons Case Is Distinguishable.

In *Ex Parte Simons,* 247 U. S. 231 (1918), the petitioner had brought an action for damages in two counts against the executors of a widow named Mrs. Frank Leslie. The

first count alleged a promise of the testatrix to bequeath a certain sum in return for plaintiff's services, and the second her promise to pay the reasonable value of those services. "On motion of the defendants the judge sitting to hear motions in the District Court ordered the first cause of action to be transferred to the equity side of the Court and docketed as an equity cause" on the ground that "by the law of New York the plaintiff could not sustain the first cause of action at law." *Id.* at 238-39. The Supreme Court held that this ruling was error, that it deprived the plaintiff of the right to trial by jury, and that mandamus would lie to rectify this error.

It is submitted that the *Simons* case, properly understood, is no authority for the action of the Court of Appeals below. That case was decided before law and equity had been fused by the Federal Rules of Civil Procedure. In it a law judge held that he had no jurisdiction over the subject matter of the cause. To correct his error in so holding, mandamus was proper. But now the district courts have jurisdiction of all causes, whether equitable or legal in nature, and the question is only one of how the case is to be tried.

The *Simons* case involved a repudiation of jurisdiction: Justice Holmes in his opinion therein said, "the order may be regarded as having repudiated jurisdiction of the first count." *Id.* at 240. See *Roche v. Evaporated Milk Ass'n, supra,* in which *Ex parte Simons* was distinguished on that ground. However, after the coalescing of law and equity procedure was completed in 1938, with the adoption of the Federal Rules of Civil Procedure, it could no longer be said that a denial of a jury trial involved repudiation of jurisdiction and, consequently, presented a situation in which an interlocutory order could properly be reviewed by a writ of mandamus. The adoption of the Rules changed the nature of the question from what tribunal has jurisdiction to how a tribunal, which admittedly has jurisdiction, should try the cause. This is made clear by the *City of*

Morgantown case which has been considered earlier, see pp. 12-13 *supra*. The majority opinion in that case, in discussing a situation identical to that now presented to this Court, said:

> ". . . This is not a situation where a 'chancellor' in denying a demand for jury trial can be said to be enjoining a 'judge' who has cognizance of a pending action at law. This is rather a case of a judge making a ruling as to the manner in which he will try one issue in a civil action pending before himself. The fiction of a court with two sides, one of which can stay proceedings in the other, is not applicable where there is no other proceeding in existence to be stayed. . . ." 37 U. S. 254, 257-58.

As long as a demand for a jury trial raised a jurisdictional question, mandamus was an appropriate remedy; when that question ceased to be jurisdictional, mandamus ceased to be an appropriate remedy. It follows that the *Simons* case is distinguishable from the instant case and that it is no authority for the Court of Appeals' action herein.

D. Conclusion.

In *Ex Parte Fahey*, 332 U. S. 258 (1947), this Court denied a petition which invoked the original jurisdiction of the Supreme Court and which asked leave to file a petition for a writ of mandamus against a district judge to vacate an order allowing counsel fees. Justice Jackson, writing for a unanimous court, said:

> "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal

counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy. We are unwilling to utilize them as substitutes for appeals. As extraordinary remedies, they are reserved for really extraordinary causes." *Id.* at 259-60.

It is respectfully submitted that the writ of mandamus should not have been issued by the Court of Appeals below for the following reasons: (1) the order of Judge Leahy, whether right or wrong, was one which he had authority to make; (2) Judge Leahy's order did not impair the jurisdiction of the court below and the issuance of the writ was not an aid to that jurisdiction; (3) review of Judge Leahy's order on petition for a writ of mandamus was a clear evasion of the conditions imposed by Congress upon appellate review and the policy against piecemeal appeals; (4) the case presented was not an extraordinary one calling for an extraordinary remedy; and (5) the remedy of the petitioners by way of appeal from final judgment is adequate. Consequently, it is urged that the Court of Appeals abused its discretion by issuing a writ of mandamus and that this Court should, through the exercise of its supervisory jurisdiction, correct that abuse.

II.

The Decision Below Conflicts in Principle With Prior Decisions of the Courts of Appeals for the Fifth and Ninth Circuits and Is Contrary to the Letter and Spirit of the Federal Rules of Civil Procedure.

National Can's position in respect to the merits of the Court of Appeals' decision is that the original complaint in the District Court contained, as a matter of federal law,[4] two basic issues: (1) the issue of Canister's right to specific performance, determinable solely by the court, and (2) the issue of Canister's right to damages, determinable by a jury, if the right to jury trial is not waived. If by the

4. The following discussion assumes that Federal law is applicable. The pertinence of *Erie Railroad Co. v. Tompkins* is discussed at pp. 22-25 *infra*.

amendment of October 3, 1950, a new issue triable by a jury had been pleaded, either party could have demanded a jury trial of that issue. But Canister could not demand a jury trial of the original issue of damages merely by repleading it in the amended complaint. Since there were two issues in the original pleading (one triable to a jury and the other by the court) and since the amendment merely eliminated the issue of specific performance and repleaded the issue of damages, it is not "the last pleading directed to such issue" under Rule 38(b). Since no demand for jury trial was served within the time provided by the Rule, measuring that time from the service of the original complaint, the resultant waiver of the right to jury trial is binding and final.

The Court of Appeals below rejected this position and held that Canister was not entitled to a jury trial prior to the filing and service of its amended complaint on October 3, 1950. That holding was apparently based upon this argument: A complaint which seeks both equitable relief and damages will not support a jury trial. If the Court of Appeals is correct, it follows that a plaintiff, by uniting legal and equitable claims, can deprive a defendant of his right to jury trial of any issue and at the same time reserve such right to himself by amending the complaint at any time to strike the prayer for equitable relief.[5]

Both the Fifth and the Ninth Circuits have rejected the argument upon which the Court below apparently based its conclusion, the Fifth Circuit in *Keene v. Hale-Halsell Co.*, 118 F. 2d 332 (1940) and the Ninth Circuit in *Bruckman v. Hollzer*, 152 F. 2d 730 (1946).

The *Keene* case involved a creditors' action against the debtor's widow and members of his family to establish a debt and cancel deeds executed by the debtor in fraud of

5. The fact that an order must be entered permitting amendment would create no great difficulty. Rule 15(a) providing that "leave [to amend] shall be freely given" has been interpreted most liberally. See, for example, Judge Leahy's opinion at R. 26 and, Judge Mandelbaum's opinion in *Bereslavsky v. Socony-Vacuum Oil Co.*, 7 F. R. D. 444 (S. D. N. Y. 1946), where he permitted amendment even though he thought it was unnecessary, merely because "I can see no harm in granting the amendment. . . ." *Id.* at 444.

creditors. The defendants moved, in the Court of Appeals, for a rehearing and to dismiss on the ground that the existence and amount of the debt was a legal issue and that a jury trial of such issue could not be had in a suit for equitable relief. The court granted the rehearing and, after having heard argument, denied the motion to dismiss. It said:

> "Nor will the suit then be defeated by the decisions in Scott v. Neely, 140 U. S. 106, 11 S. Ct. 712, 35 L. Ed. 358; Cates v. Allen, 149 U. S. 451, 13 S. Ct. 883, 37 L. Ed. 804; and White v. Croker, 5 Cir., 13 F. 2d 321. They hold that there is not jurisdiction in equity in a federal court to set aside conveyances made in fraud of creditors and to administer the property conveyed, at the instance of simple contract creditors without judgment or other lien. The reasons there given for dismissing the bill, or remanding it, were that the existence and amount of the debt made a law issue, and a jury trial of it could not be afforded the debtor in equity; and that the creditors had not exhausted their remedies at law. These reasons will not be good in this case if they be urged by the administratrix, for the Rules of Civil Procedure, 28 U. S. C. A. following section 723c, will now apply, and under them all remedies, legal and equitable, are available, and a jury trial of issues that constitute a case at common law in the meaning of the Constitution may easily be separately had. Rules 38 and 42. We do not foresee any insuperable obstacle to a final settlement of the whole controversy in this suit." *Id.* at 335.

The complaint in the *Bruckman* case set forth three sets of transactions for each of which relief was claimed. It was alleged that the defendants had infringed the plaintiff's copyright and damages were sought; it was alleged that one defendant had appropriated the copyrighted matter and reproduced it at a profit and an accounting for that profit

was sought; and, finally, it was alleged that the defendant charged with appropriation had infringed and intended to continue to infringe and an injunction was sought. On plaintiff's demand for a jury trial, the court held that it would try the issues of infringement and damages to a jury before deciding the equitable aspects of the case. The court said:

> ". . . The rules introduce the radical change in the federal practice of creating the jurisdiction in the District Courts to hear and determine in a single suit equity claims, with a claim which theretofore could have a common law adjudication in a separate suit. We take it that it is to 'preserve' in the suit provided by the rules the common law adjudication by jury trial existing in a separate suit when such a claim is joined with equitable claims having a common issue of fact, that Rule 38(a) provides: '(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.'
>
> "Rule 42(b) specifically gives the power to the court to prevent 'prejudice' such as that to the plaintiff's right to trial by jury by 'order[ing] a separate trial of any claim,' here by ordering first a separate common law trial by jury on the issue of damages, in which the issue of infringement and the amount of damages will be determined before the decision on the equitable issues.
>
> "We regard the rules enlarging the powers of the single tribunal to hear and determine equitable and legal transactions in which the pre-existing right to jury trial is to be preserved, as a long forward step in our judicial procedure. We consider one of its major purposes is to remove the expensive and time-losing requirement of two separate suits to give to the

litigant his jury as well as his equitable relief. We are not in accord with the extreme judicial conservatism which instinctively clings to outmoded intricate processes and would seek to nullify or minimize every attempt for their simplification." 152 F. 2d 730, 732-33.

The *Keene* and *Bruckman* cases can only be reconciled with the decision of the Court of Appeals below by drawing a distinction between a complaint which pleads two issues in separate counts and a complaint which pleads the same two issues in a single count. Such a distinction is, it is submitted, most unrealistic.

Notwithstanding the mechanics or form of pleading adopted by Canister, its original complaint, when first filed, presented two issues to the trial court: its right to specific performance and its right to damages. The evidence which would support a judgment granting relief as to the first issue, *i.e.*, granting an injunction, would not of itself support a judgment granting relief as to the second issue, *i.e.*, granting money damages. These two issues could have been pleaded in separate counts. The fact that Canister chose to combine them in a single count should not affect its right to a jury trial on the legal issue.

Regardless of the issues presented by the original complaint when first filed, after January 3, 1944 it presented only the single issue of damages because Canister's right to specific performance had become moot. The amended complaint presents the same issue of damages. It is well established that amended complaints introducing no new issues are not pleadings directed to an issue within the meaning of Rule 38(b). To distinguish the present case on the ground that the amended complaint states a different form of action would be contrary to the purpose of Rule 2 to provide for a single form of action known as a civil action. If a pleading raises no new issues, it should make no difference whether it is stated in the form of a new cause of action or not.

Finally, we submit that the Court of Appeals erred in ignoring the following conclusions of Judge Leahy who has been familiar with every aspect of the litigation in the District Court:

1. Canister "prosecuted and considered the action as a legal action at all times" (R. 44) and "had no interest at all in equitable relief" (R. 45) but was "interested solely in legal relief." (R. 49).

2. "The request for damages for $10,000,000 was never considered by the parties as 'incidental' to the prayer for equitable relief." (R. 49).

3. Canister received early notice that if it was successful—as it was—on the breach of contract and statute of fraud issues, there would be a separate trial on the legal issue of damages (R. 51). Yet Canister took no steps to secure a jury trial of that issue until 4½ years after it first received notice that it would be separately tried. (R. 51).

These facts, together with the fact that any equitable issues raised in the original complaint have been moot since January 3, 1944 (R. 51-2), establish that Canister's failure to ask for a jury trial before June, 1948 is tantamount to an election to have the single remaining legal issue of money damages tried without a jury. By deciding this case on the basis of the face of the complaints and ignoring the history of the case, the Court of Appeals has sacrificed the realities for paper labels.

It is respectfully submitted that the decision below is (a) in conflict with prior decisions of the Courts of Appeals for the Fifth and Ninth Circuits and (b) contrary to the letter and spirit of the Federal Rules of Civil Procedure. This Court should grant the writ of certiorari prayed for in order to resolve the conflict between the circuits and to guide the lower federal courts in the administration of the Rules.

III.

The Court Below Did Not Consider and This Court Should Determine at This Time Whether, in a Diversity Case, a Party's Right to Jury Trial Is Governed by State Law.[6]

The instant case is a non-federal action. The jurisdiction of the federal courts over it depends upon diversity of citizenship. Consequently, this question is presented: Is Canister's right to a jury trial governed by state or federal law?

Two district courts have held that the rule of *Erie Railroad Co. v. Tompkins*, 304 U. S. 64 (1938), requires that state law control. This conclusion is in harmony with the principle underlying the *Erie* decision: The desirability of affording litigants, who invoke the jurisdiction of the federal courts because of diversity of citizenship, substantially the same treatment in those courts as they would otherwise have received in state courts.

Ross v. Service Lines, Inc., 31 F. Supp. 871 (E. D. Ill. 1940), was an action for injuries sustained in an accident. Federal jurisdiction was founded upon diversity of citizenship. The defendant interposed the defense of release of the damages claimed. The plaintiff, in reply to this defense, confessed the release and attempted to avoid it. He moved for a jury trial of the issue thus raised. The trial court denied this motion on the ground that the validity of the release was a question which, under Illinois law, should be tried by the court.

> ". . . I take it that since Erie v. Tompkins, the remedies of the parties in Illinois shall be determined as the law of that state directs, unless in violation

6. This point was not raised in the court below. The issuance of the writ was opposed solely on the grounds that Canister was not entitled to a jury trial under the provisions of the Federal Rules and that, in any event, Judge Leahy's interlocutory order was not properly reviewable on petition for a writ of mandamus.

of some federal statute. The existence or non-existence of a certain remedy and the determination of its character, as between law and equity, involve more than mere procedural questions. Consequently, I consider myself bound to follow the reasoning of the Supreme Court of Illinois and to grant to each party the rights and impose upon them the obligations that they have under the state law." *Id.* at 873.

Beagle v. Northern Pacific Ry., 32 F. Supp. 17 (W. D. Wash. 1940), is a similar case which reached the same result. There a law action was commenced in the courts of the State of Washington and removed to the federal courts. The plaintiff sought to recover damages for personal injuries for negligence. The defendant pleaded a release and the plaintiff replied that the release was procured by fraud. The defendant then moved to have the issue of fraudulent release tried by the court without a jury. This motion was denied.

> "Furthermore, this is a typical situation where the rule of the late case of Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, should be applied and effect given to the law as announced by the state supreme court in order to avoid needless conflict between the federal and state courts as to what the law is in a given case, when that law is not declared by an act of Congress, the Constitution of the United States or the decision of a federal appellate court binding on this court. My attention has not been called to any statutory or constitutional provision giving defendant the specific right to have this fraudulent release issue tried by the court without a jury. The new Rules of Civil Procedure, 28 U. S. C. A. following section 723c, do not so provide. Counsel do not cite any controlling federal appellate court decision so holding." *Id.* at 18.

If the rule of the *Ross* and *Beagle* cases is correct, Canister is not entitled to a jury trial in respect to the issue of damages. The law of Delaware clearly provides that in circumstances such as those presented by the record herein, the issue of damages must be tried to the court.

Delaware still maintains the ancient division between law and equity and vests legal and equitable jurisdiction in separate and distinct courts, the Superior Court and the Court of Chancery. Prior to 1947, there was no provision whereby actions brought in the Court of Chancery were transferable to the Superior Court. In 1947, a statute providing for the transfer of civil actions from one Delaware court to another was adopted by the General Assembly of Delaware. However, it applies only to suits which would otherwise have been dismissed on the ground that the transferring court was without jurisdiction. 46 Laws of Delaware, Ch. 255 (1947); see Appendix.

Since the original complaint in this case asked for specific performance, Canister, if it had chosen to bring it in the Delaware courts, would of necessity have brought it in the Court of Chancery. Once that court had jurisdiction, it would have retained jurisdiction even though the issue of specific performance became moot. *Saunders v. Saunders,* 71 A. 2d 258 (Del. Sup. Ct. 1950). The suit would never have been subject to dismissal (or, after the 1947 statute, to transfer) for lack of jurisdiction.

Consequently, if this case had been brought in the Delaware state courts, it would necessarily have been brought in a court where no party is entitled to a jury trial (*Saunders v. Saunders, supra*) and it would never, and could never, have been transferred to the only court in Delaware, the Superior Court, where parties to a civil action are entitled to a jury trial. Thus, under the law of Delaware, Canister could never have obtained a jury trial. To permit it to do so because it chose to bring its action in the federal court would permit "another court of the State" (*Guaranty Trust Co. v. York,* 326 U. S. 99, 108 (1945)) to

give that which Delaware has withheld and would be contrary to the rule of *Erie Railroad Co. v. Tompkins.*

It is respectfully submitted that this Court should, at this time, decide the question of whether the right to jury trial, in a diversity case, is governed by federal law or by state law.

CONCLUSION.

The petitioner respectfully urges that this Petition presents an unusually persuasive situation for the exercise of this Court's jurisdiction under 28 U. S. C. § 1254(1) in that the following factors are present:

1. The review of the order of the District Court on petition for writ of mandamus prior to final judgment in the District Court conflicts with prior decisions of this Court;

2. The Court of Appeals' decision is in conflict with prior decisions of the Courts of Appeals for the Fifth and Ninth Circuits and is contrary to the letter and spirit of the Federal Rules of Civil Procedure; and

3. This case presents an issue of great public importance—the issue of whether the rule of *Erie v. Tompkins* governs a party's right to a jury trial—which has not been, but should be finally determined by this Court.

WHEREFORE, it is respectfully requested that this Petition be granted.

Respectfully submitted,

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October 26, 1951.

APPENDIX.

An Act to Amend Chapter 108 of the Revised Code of Delaware, 1935, as Amended, Entitled "General Provisions Concerning Courts", by Providing for the Transfer of Civil Actions, Suits or Other Proceedings in the Courts of the State of Delaware.

Be it enacted by the Senate and House of Representatives of the State of Delaware in General Assemly met:

Section 1. That Chapter 108 of the Revised Code of Delaware, 1935, as amended, be and the same is hereby further amended by inserting after 4235, Sec. 1, of Chapter 108 a new section to be known as 4235A. Sec. 1A:

4235A. Sec. 1A. No civil action, suit or other proceeding, pending at the approval hereof or hereafter brought in any court of this State shall be dismissed solely on the ground that such court is without jurisdiction of the subject matter, either in the original proceeding or on appeal, but the proceeding may be transferred to an appropriate court for hearing and determination, provided that the party otherwise adversely affected shall, within 60 days after the order denying the jurisdiction of the first court has become final, file in that court a written election of transfer, discharge all costs accrued in the first court, and make the usual deposit for costs in the second court. All or part of the papers filed, or copies thereof, and a transcript of the entries, in the court where the proceeding was originally instituted shall be delivered in accordance with the rules or special orders of such court, by the prothonotary, clerk, or register of that court to the prothonotary, clerk or register of the court to which the proceeding is transferred. The latter court shall thereupon entertain such application in the proceeding as conform to law and to the rules and practice of such court, and may by rule or special order pro-

vide for amendments in pleadings and for all other matters concerning the course of procedure for hearing and determining the cause as justice may require. For the purpose of laches or of any statute of limitations, the time of bringing the proceeding shall be deemed to be the time when it was brought in the first court. This statute shall be liberally construed so as to permit and facilitate transfers of proceedings between the courts of this State in the ends of justice.

Approved April 9, 1947.

FILED
NOV 16 1951
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 402

HONORABLE PAUL LEAHY, Chief Judge of the United States District Court for the District of Delaware and NATIONAL CAN CORPORATION,

Petitioners,

—against—

THE CANISTER COMPANY and THE CANISTER COMPANY, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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Of Counsel.

November 17, 1951.

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Opinions Below

The opinion of the Court of Appeals appears in 191 F. 2d 255 (advance sheets) and is printed in R. 135-138. The opinion of Judge Leahy appears at R. 43-52, and is not reported.

Jurisdiction

The jurisdictional requisites are set forth in the petition.

Questions Presented

1. Whether plaintiffs, who commence civil actions in a United States District Court, upon a single cause of action, seeking equitable relief for specific performance of a breached contract, and for an accounting for damages, and who thereafter amend their complaints by leave of Court, so as to waive all equitable relief, and confine themselves solely to money damages for breach of the contract, have the right to demand trial by jury contemporaneously with the amendment to the complaints.

2. Whether a denial by the District Court of right to trial by jury in such a case presents a proper cause to a Court of Appeals for the exercise of its discretion to issue a writ of mandamus.

Constitutional Provision and Rule Involved

The Seventh Amendment to the Constitution, which reads:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Federal Rules of Civil Procedure, Rule 38, to the extent material, reads:

"RULE 38. JURY TRIAL OF RIGHT.

(a) RIGHT PRESERVED. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) DEMAND. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party."

Statement

The litigation involves two civil actions commenced by respondents, as plaintiffs, in the United States District Court for the District of Delaware. As these two actions for present purposes are in all respects similar, and have been consolidated, we shall treat them as one.

The original complaint alleged that plaintiff was a manufacturer of fibre-bodied metal-end containers, and that defendant contracted to fabricate and supply metal ends for such containers; that defendant breached that contract; that such articles to be supplied by defendant could not be procured elsewhere; that defendant knew of the great demand made upon plaintiff by its customers; and that plaintiff could not perform its contracts because of such breach by defendant; and that such breach was causing plaintiff irreparable harm (R. 8-13).

The complaint concluded with prayers that defendant be required to perform its contracts, and to account and

pay to plaintiff $10,000,000, or such other sum as may be found due (R. 13). The complaint concluded with an omnibus prayer for such other relief as the case may require (R. 13).

Defendant answered (R. 84-90).

Judge Leahy thereafter upon defendant's motion under Rule 42(b), F. R. C. P., ordered that the issues of the making of the contract sued upon and whether it was barred by the applicable statute of frauds should be tried in advance of the other issues (*Canister Co.* v. *National Can Corp.*, 3 F.R.D. 279 [D. C. Del. 1943]).

That issue was determined favorably to respondents, although by a series of subsequent amendments the scope of that determination was materially cut down. (*Canister Co.* v. *National Can Corp.*, 63 F. Supp. 361 [D. C. Del. 1945]; *Canister Co.* v. *National Can Corp.*, 64 F. Supp. 808 [D. C. Del. 1946]).

There was an abortive appeal to the Court of Appeals, which dismissed the appeal upon the ground that a judgment as to some of the issues was not appealable (*Canister Co.* v. *National Can Corp.*, 163 F. 2d 683 [3d Cir. 1947]).

There were then two preliminary efforts by Canister to secure trial by jury. Neither one forms the basis of the present proceeding, but we recite them solely as part of the history of the case.

In 1948 respondents moved for a jury trial in the discretion of the Court because equitable relief in the meantime had become moot. Judge Leahy denied that motion, saying that he and counsel had regarded the action as being "at law", and that hence a jury could have been demanded at the inception of the action (*Canister Co.* v. *National Can Corp.*, 8 F. R. D. 408, 409 [D. C. Del. 1948]).

Subsequently, Canister filed a formal document waiving equitable relief and demanding trial by jury (R. 23). Judge Leahy denied that motion (R. 24-26, no opinion for publication). Thereupon, Canister sought a writ of mandamus to compel Judge Leahy to place the case on the jury list. That petition was denied because although the Court of Appeals agreed with Canister that the complaints sought equitable relief, it asserted that in the absence of a formal amendment of the complaint the actions were still equitable in nature and that no jury trial could be had at that stage. (*Canister Co.* v. *Leahy,* 182 F. 2d 510 [3d Cir. 1950].)

This was the first time that respondents were able to obtain an expression of an appellate court that the complaint was of an equitable nature, contrary to Judge Leahy's misconceptions.

Thereupon respondents moved in the District Court for leave to amend the complaints so as to drop the prayers for equitable relief and substitute a prayer for money damages. That motion was granted (R. 27). Amended complaints and jury demands were served and filed simultaneously on October 3, 1950 (R. 28-42).

Thereupon National Can moved to strike out the jury demands. Judge Leahy granted that motion (R. 43-54).

Although the Court of Appeals had decided that the nature of the actions should be determined from the complaints (*Canister Co.* v. *Leahy,* 182 F. 2d 510 [3d Cir. 1950]), Judge Leahy reverted to his earlier conception that the complaints were at "law", and that Canister was too late in demanding a jury (R. 43-52).

Respondents then again sought a writ of mandamus from the Third Circuit. That writ was granted because now respondents came within Rule 38(b), F.R.C.P. (R. 135-138, 191 F. 2d 255, adv. sh.).

It is this last determination which petitioners seek to review.

Argument

Notwithstanding the efforts of petitioners in straining to create a problem, the questions presented are very narrow, present no conflict among the several circuits, and the determination by the Court of Appeals is correct.

The petition presents no question that was not presented in *Bereslavsky* v. *Caffey*, 161 F. 2d 499 (2d Cir. 1947) and *Bereslavsky* v. *Kloeb*, 162 F. 2d 862 (6th Cir. 1947), in both of which cases this Court denied the applications for writs of certiorari (*Caffey* v. *Bereslavsky*, 332 U. S. 770 (1947) and *Kloeb* v. *Bereslavsky*, 332 U. S. 816 (1947).

Moreover, if any other issues are raised, they are *sui generis* to this litigation, and do not warrant consideration by this Court.

I

No right to a jury trial existed when the civil actions were commenced.

When the Federal Rules of Civil Procedure were adopted, for most purposes it became unimportant to determine whether an action was one formerly denominated as "legal" or "equitable." However, when questions with regard to jury trial arise, it becomes necessary to so categorize the action. Indeed, the enabling legislation, formerly 28 U. S. C. §723c; June 19, 1934, c. 651, §2; 48 Stat. 1064, now 28 U. S. C. §2072, expressly recognized that, and prohibits any interference with the right to trial by jury guaranteed by the Seventh Amendment. Rule 38 (a) imple-

ments that guaranty, and Rule 38 (b) provides that such demand shall be made not later than 10 days after "the service of the last pleading directed to such issue."

Almost immediately the question arose as to the rights of the parties where the action embraced two or more claims, one of which was formerly cognizable in law and the other in equity.

Thus, where a claim arose out of a single occurrence, event or transaction, and plaintiff prayed for equitable relief and also sought money damages for the same wrong, no right to trial by jury existed, because prior to the merged practise equitable courts could render money judgments in cases where equitable jurisdiction had attached. (*Bellevance* v. *Plastic-Craft Novelty Co.*, 30 F. Supp. 37 [D. C. Mass., 1939]; *Williams* v. *Collier*, 32 F. Supp. 321 [E. D. Pa., 1940]; *Fraser* v. *Geist*, 1 F. R. D. 267 [E. D. Pa., 1940].)

This Court held to like effect prior to the adoption of the Rules (*National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 48 [1936]).

Bruckman v. *Hollzer*, 152 F. 2d 730 (9th Cir., 1946) shows the other side of the coin. There three separate and distinct claims, arising out of three separate transactions, were pleaded in a single civil action. The first was a pure claim for a money judgment. The other two claims were for equitable relief. Plaintiff demanded a jury trial on the first issue only. Defendant moved to strike that demand upon the ground that combining separate causes of action in one complaint barred a jury trial as to all claims. That motion was denied and defendant sought mandamus. The Ninth Circuit pointed out the distinction between complaints founded on one occurrence, event or transaction, and those founded on independent claims, saying at 152 F. 2d 731:

> "However, no one of the three transactions alleged needs for its adjudication the prior decision of either of the others, hence the instant case is unlike Fitzpatrick v. Sun Life Assur. Co., D. C., 1 F. R. D. 713, 717, and Pallant v. Sinatra, D. C., 59 F. Supp. 684, 685, where the opinion states that there can be no recovery on the common law claim unless recovery be had in the equitable issues."

The right to a jury trial on the separate claims was preserved.

The original complaints at bar, sought equitable relief and an accounting for damages arising out of a single contract and its breach (R. 8-22).

The Court of Appeals in the first mandamus proceeding so held, notwithstanding the district judge always "regarded" the action as being one only for money damages (*Canister Co.* v. *Leahy,* 182 F. 2d, 510 [3d Cir., 1950]).

Thus it is clear that upon the inception of the actions no right to trial by jury existed.

Moreover, we do not conceive that the Court should attempt to review the nature of the original complaints. That does not present any important question of general law.

II

Upon the amendment of the complaints, the right to demand jury trial arose.

The District Court gave leave to respondents to amend their complaints after the Court of Appeals in the first mandamus proceeding, had sustained respondents' claim that the complaints were solely equitable (R. 26-27). Respondents availed themselves of that right and served amended complaints converting the actions into legal actions (R. 28-41). Simultaneously, they served and filed jury demand (R. 42).

Thus the sole issue is whether the right to demand trial by jury is created by amending the complaints, converting them from equitable complaints to legal complaints, and whether the time within which to make such demands is measured by such amended pleadings.

That question has been answered in the affirmative in the two *Bereslavsky* cases, in both of which this Court denied the petition for a writ of certiorari (*Bereslavsky* v. *Caffey,* 161 F. 2d 499 [2d Cir., 1947], cert. den. 332 U. S. 770 [1947]; *Bereslavsky* v. *Kloeb,* 162 F. 2d 862 [6th Cir., 1947], cert. den. 332 U. S. 816 [1947]).

In the case at bar the Third Circuit has followed the Second and Sixth Circuits. No circuit has held otherwise. Significantly, petitioners have ignored the two *Bereslavsky* cases, and have sought to create a conflict by reference to cases which in fact are in harmony with our views.

We have heretofore discussed *Bruckman* v. *Hollzer,* 152 F. 2d 730, decided by the Ninth Circuit, which merely held that where two or more separate claims are joined in one

action, the right to jury trial must be determined separately for each count.

Keene v. *Hale-Halsell Co.*, 118 F. 2d 332 (5th Cir., 1940) is of like tenor. There a simple contract creditor, who had not reduced his claim to judgment, commenced a creditor's suit to avoid certain deeds claimed to be in fraud of creditors. After trial, no one having demanded a jury, the defendants asserted that the action could not be maintained because defendants were entitled to a jury trial on the law issue of the existence and amount of plaintiff's claim. The Court followed the same reasoning as in the *Bruckman* case, saying that a separate jury trial could be had on that issue.[1]

The distinction is not the artificial one posed by petitioners at page 20 of the petition, as to whether two issues are pleaded as separate counts or as one. The real distinction is whether in fact a plaintiff sues upon a single wrong, or upon two or more independent wrongs.

Canister presented a single issue and not two by its original pleadings: the existence and breach of a single contract, and the relief to which it was entitled.

The decision by the Court of Appeals is correct as the right to a jury trial arose when the complaints were amended, and the demand was made concurrently with the service and filing thereof—well within ten days of the service of the last pleading directed to the issue to be tried.

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[1] We shall discuss the *Keene* case further in connection with petitioners' new contention that the right to jury trial is governed by state law.

III

The right to jury trial is not governed by State law.

As the footnote at page 22 of the petition discloses, petitioners never heretofore claimed, nor did any Court consider, whether the right to demand a jury was governed by state law.

Under those circumstances, this Court has the right to, and should, ignore that point. (*Burnet* v. *Commonwealth Improvement Co.*, 287 U. S. 415, 418 [1933].) That is equally so where the point is first raised in the petition for the writ of certiorari. (*Helvering* v. *Wood,* 309 U. S. 344, 348 [1940].)

Moreover, this Court, if possible, should avoid being a court of first instance in construing local law (*Helvering* v. *Stuart,* 317 U. S. 154, 164 [1942]).

However, the right to trial by jury in a federal court is exclusively a federal question and has always been so recognized.

The Seventh Amendment expressly preserves the right to jury trial in common law actions. It is hard to visualize a common law action in a federal district court, other than one involving diversity of citizenship, in view of the limited class of cases over which federal courts have jurisdiction.

This Court took great pains to say in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 78 (1938) "There is no federal general common law."

If we were to follow petitioner's belated view we would reach the startling conclusion that the Seventh Amendment is almost without significance.

All that the *Erie Railroad* case decided was that the Rules of Decision Act (now Judicial Code, §1652) embraces state judicial determinations as well as statutory enactments. We have no quarrel with that doctrine.

However, the jurisdiction of federal courts and the mode of trial flow from the constitution, federal statutes and rules. The right to jury trial, or absence thereof, is neither enlarged nor diminished by any question of state court practice.

Scott v. *Neeley,* 140 U. S. 106 (1891) was a case in which a simple contract creditor, who had not reduced his claim to judgment, commenced a creditor's bill in a federal court, at a time when the federal courts had separate law and equity sides. The law of the state in which the Court sat permitted such an action. Nevertheless, the bill was dismissed because it would deprive defendants of the right to test plaintiff's claim to be a creditor, and the amount of the claim, before a jury. The state statute could not confer jurisdiction upon a federal court, nor deprive a party of a jury which is preserved in common law actions.

The same problem arose in *Keene* v. *Hale-Halsell Co.,* 118 F. 2d 332 (5th Cir., 1940), after the adoption of the merged practice. Although the application of the rule varied, the underlying principle remained immutable. Under the new practice one suit was sufficient, but the common law issue could be tried to a jury.

Significantly, the Court saw no reason for applying state law in either instance, for state law can neither coalesce or divide the practice in federal courts.

The problem has also arisen in other settings. Thus where state statutes provide that certain issues cannot be withdrawn from the jury's consideration, such statutes are

not binding upon federal courts in diversity cases (*Herron* v. *Southern Pacific Co.*, 283 U. S. 91 [1931]).

Beagle v. *Northern Pacific Ry.*, 32 F. Supp. 17 (W. D. Wash. 1940), was decided by a district court in the Ninth Circuit, six years prior to *Bruckman* v. *Hollzer*, 152 F. 2d 730 (9th Cir., 1946). If the former decides anything at variance with the latter, it has been overruled. However, in fact nothing contrary to our views was then decided. That was a jury case. Defendant wanted one issue tried separately by the Court. Since counsel did not cite any applicable law, the Court decided to follow state practice. We do cite federal law.

Moreover, the case is significant for another reason. In what the Court considered an open question, it followed a course which resulted in a jury trial. Significantly, while there is a constitutional guaranty of a jury trial in common law actions, there is no provision guaranteeing a non-jury trial in any case. Manifestly in any doubtful case, the question should be resolved in favor of jury trial.

In *Ross* v. *Service Lines, Inc.*, 31 F. Supp. 871 (D. C. Ill., 1940), the Court had theretofore decided to have a separate trial of one of the issues. He now decided that the separate issue should be tried to the Court. That determination was based solely upon the fact that the existence or non-existence of a remedy involved a substantive question of state law. Here, we are faced only with the question whether the complaints originally pleaded a cause in equity and now at common law. Answering those questions in the affirmative, the right to jury trial emerges.

To adopt petitioners' views would be a distinct step backward. In substance, it would mean that in those few states that still adhere to a divided practice, the federal courts in violation of the Rules would have to conform

thereto. Even under the old conformity practice, states which had a merged procedure could not foist such jurisdiction upon federal courts; likewise, states with a divided practice cannot deprive federal courts of the advantages of a merged practice.

It is clear, if this point is considered by the Court, that the right to a jury trial is governed by federal law exclusively.

IV

The Court of Appeals was warranted in granting a writ of mandamus.

Little profit will result in quoting from opinions as to when courts are warranted in entertaining applications for writs of mandamus. In those cases in which the writ was deemed to be the proper remedy, as well as those in which it was felt that the writ should not issue, courts have used virtually identical language. We shall not rely upon abstract language as to what is or is not an extraordinary case. What is significant is that in every case where the issue was the right to a jury trial, mandamus was considered a proper remedy and the case was determined on the the merits.

Ex parte Simons, 247 U. S. 231 (1918) raised that point squarely. Petitioners urge that since the fusion of law and equity that case has lost the force of its reasoning. They seem to labor under the misapprehension that in 1918 United States District Courts did not have equitable jurisdiction, and that the result of the district judge's action was to repudiate jurisdiction of the action, resulting in a dismissal of the same. Nothing is further from the facts.

The action was transferred to the equity side of the court and docketed as an equity cause (247 U. S. 231, 238). Manifestly, the plaintiff in that case was not concerned with whether the papers were filed in a jacket that bore the label "equity", and entries were made in a docket bearing the same label. The litigant in the *Simons* case was concerned because the effect of the district court's order was to deprive her of a jury trial. The law judge and the chancellor in the federal judicial system have always been the same person. Jurisdiction in the *Simons* case would have been exercised, but before a judge without a jury. Transfer from law side to equity was merely the mechanics exercised to deny a jury trial. Today the comparable order is the one of Judge Leahy granting the motion to strike the jury demand and place the case on the non-jury list. The wrong is as great, and the remedy is the same.

Moreover, the remedy was resorted to and sustained in the *Bereslavsky* cases, *supra.*

City of Morgantown v. *Royal Insurance Co.,* 337 U. S. 254 (1949) decides nothing to the contrary. That involved an attempt to appeal and not a mandamus proceeding. All that this Court held was that an interlocutory order denying trial by jury does not constitute an injunction and hence is not appealable. This Court took great pains in the concluding paragraph of its opinion to show that it did not reach the merits. Moreover, that case concerned the question as to which issue should be tried first, the equity issue, without a jury, or the legal issue, with a jury. In the *Canister* cases, only one issue—damages—remains.

The Court of Appeals wisely exercised its power in granting the writ of mandamus, and the cause should not be further delayed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Of Counsel.

November 17, 1951.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 402.

HONORABLE PAUL LEAHY, CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE AND NATIONAL CAN CORPORATION,

Petitioners,

—against—

THE CANISTER COMPANY AND THE CANISTER COMPANY, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

REPLY TO BRIEF FOR RESPONDENTS IN OPPOSITION.

1. Since the petition for certiorari was filed in this case, a similar petition has been filed in the case of *Palumbo v. Ganey,* (3rd Cir.) No. 432, this Term, filed November 16, 1951. While the contentions of the petitioners in this case and in the *Palumbo* case as to the availability of mandamus in a court of appeals to review interlocutory orders are diametrically opposed, we submit that the difference in attitude of the court below in the two cases presents additional grounds for review by this Court. If mandamus is not available in the *Palumbo* case to protect the freedom

of an individual defendant from a charge of criminal contempt for failure to obey a prosecutor's order, it should not be available in the instant case to insure the corporate respondents a jury trial on the issue of damages. The difference in attitude of the court below demonstrates the unsettled nature of the question and the public importance of a final determination by this Court.

2. In respondents' brief in opposition to the petition for certiorari reliance is placed upon *Bereslavsky v. Caffey,* 161 F. 2d 499 (2d Cir. 1947), cert. den. 332 U. S. 770 (1947) and *Bereslavsky v. Kloeb,* 162 F. 2d 862 (6th Cir. 1947), cert. den. 332 U. S. 816 (1947), both as to the availability of the writ of mandamus in a court of appeals to review interlocutory orders and as to the correctness of the ruling of the court below that respondents are entitled to a jury trial on the issue of damages.

However, the Court of Appeals in *Bereslavsky v. Caffey* misconceived the nature of the cases decided by this Court which it cited in support of its power to issue the writ. In *Ex parte Peru,* 318 U. S. 578 (1942), the issue involved the protection of the immunity of a friendly foreign power. In *United States Alkali Association v. United States,* 325 U. S. 196 (1945), the question presented not only went to the jurisdiction of the district court to entertain the suit, but, if the defendants in that suit had been right in their contention, a trial on the merits would have frustrated the statutory scheme which Congress had designed for the control of anti-trust activities. In *Los Angeles Brush Mfg. Corp. v. James,* 272 U. S. 701 (1926), the court said that a writ would issue to prevent a persistent disregard of the rules of procedure prescribed by the Supreme Court. It is clear that the three cases discussed were "really extraordinary causes" within the meaning of the *Fahey* case (332 U. S. 258 (1947)). Moreover, no writs were issued in the *United States Alkali* and *Los Angeles Brush* cases and no writ was issued in *Ex parte Peterson,*

253 U. S. 300 (1919). The language in the *Peterson* case on which Judge Frank relied in *Bereslavsky v. Caffey* is merely dictum; the dictum, moreover, depends entirely upon *Ex parte Simons,* 247 U. S. 231 (1918), and is subject to the same criticism as that case (see petition for certiorari herein, pp. 13-15). Thus, the decision in *Bereslavsky v. Caffey* is not only not supported by the decisions upon which it relies, but it is also inconsistent with the pertinent decisions of this Court which are discussed at pages 9 to 16 of the petition for certiorari.

Our comments on *Bereslavsky v. Caffey* apply equally as well to *Bereslavsky v. Kloeb.*

With respect to the effect of the *Bereslavsky* cases as authority to support respondents' right to a jury trial on the issue of damages, we respectfully submit that the discussion at pages 16 to 21 of the petition for certiorari demonstrates that the *Bereslavsky* cases, as well as the decision below, conflict in principle with *Keene v. Hale-Halsell Co.,* 118 F. 2d 332 (5th Cir. 1940) and *Bruckman v. Hollzer,* 152 F. 2d 730 (9th Cir. 1946), and are contrary to the letter and spirit of the Federal Rules. Respondents argue at page 10 of their brief in opposition that Canister presented a single issue by the original complaint. But, as we have shown in the petition for certiorari, the evidence which would support the granting of specific performance would not necessarily support the granting of money damages; similarly, evidence which would support the granting of money damages would not necessarily support the granting of specific performance. Hence, two issues were originally presented to the trial court: Canister's right to specific performance and its right to damages. Respondent's attempt to distinguish the *Keene* and *Bruckman* cases is not well taken.

CONCLUSION.

For the foregoing reasons and for the reasons advanced in the petition for certiorari, the petition should be granted.

Respectfully submitted,

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